1960

Ashworth Transfer, Inc v. Public Service Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

Harry D. Pugsley; Pugsley, Hayes, Rampton & Watkiss; Attorneys for Plaintiff;

IN THE SUPREME COURT
of the
STATE OF UTAH

ASHWORTH TRANSFER, INC.,

Plaintiff;

vs.

THE PUBLIC SERVICE COMMISSION OF UTAH; HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, its Commissioners; and CARBON MOTORWAY, INC.,

Defendants.

Case No. 9320

BRIEF OF PLAINTIFF

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Comes now the plaintiff, ASHWORTH TRANSFER, INC., and respectfully sets forth the following facts and argument in support of its appeal from the decision of the Public Service Commission of Utah in its case No. 4865, and particularly from the Report and Order issued thereon on June 30, 1960.

STATEMENT OF FACTS

The matter arose as a result of an application by Ashworth Transfer, Inc., hereinafter referred to as "Ashworth," for an increase of its rates for the transportation of ammonium nitrate from the United States Steel Plant at Geneva, Utah, where it is manufactured, to the Kennecott Copper Company at its mine in Bingham Canyon Utah. This commodity had been transported for several years by Carbon Motorway on an almost daily basis to Bingham Canyon, where the ammonium nitrate is used for blasting in the mining operations of Kennecott Copper Company. Ashworth had transported the ammonium nitrate for a period of about 18 months under the existing tariff level of 12c per cwt. and has moved an average of four full loads per week of 40,400 pounds each or in excess of 160,000 pounds of ammonium nitrate for blasting purposes each week.

An objection was made to the increase in the tariff on the grounds that Ashworth did not hold authority from the Commission to transport that commodity, and secondly on the grounds that the rate was not compensatory. After a hearing on the issues, the Commission issued its Report and Order dated June 30, 1960, wherein two of the commissioners, being the majority, held that the Ashworth authority was not broad enough to include the transportation of ammonium nitrate, and one Commissioner, Mr. Donald Hacking, vigorously dissented on the grounds that the ammonium nitrate was in fact within the scope of the Ashworth authority, and in addition found that the proposed rate was compensatory. The majority made no finding as to whether or not the proposed rate was compensatory.

Petition for rehearing and reconsideration was duly filed on July 1, 1960, but was denied on July 13, 1960. This appeal was filed for a Writ of Review on August 1, 1960, and the Writ issued that same date.

The decision turned upon the issue of whether prilled ammonium nitrate is in fact an explosive or "a commodity such as an explosive," so as to permit the transportation by Ashworth. The Ashworth authority provides that it may transport "Commodities which, by reason of their size, shape, weight, origin, or destination require equipment or service of a character not regularly furnished by common carrier at the regular line rates, *which commodities shall be such as, but shall not be limited to the following*: Gasoline tanks, boilers, pipes and tubing to be used in connection therewith; cable bridges, or structural iron or steel; CCC camp equipment, supplies and building material: concrete mixers, culverts, *explosives,* grading and road equipment, ..." (Record 196 and 262). (Italics added).

The testimony was that the ammonium nitrate is purchased from Geneva Steel by Kennecott Copper for the purpose of blasting. The commodity is bagged in 50 pound bags, and consists of the ammonium nitrate in a prilled form, that is, very small pellets, covered with Fuller's earth, an organic coating. The commoditly has been used for several years for this purpose, and is the same commodity as is sold by United States Steel as a fertilizer. At the mine it is the custom to pour some diesel or fuel oil on it prior to or at the time of placing the ammonium nitrate in the drill hole. Then a detonator is added and the combination produces the explosion. Though this is designated as a "fertilizer," it is clear from

the record that it is not sold or purchased in this instance for other than blasting purposes.

Mr. Hardy was called as a witness by the protestant. He is employed by the Bureau of Explosives. (This is not a Government agency, but is a bureau of the Association of American Railroads, one of which is the owner and in control of the protestant CARBON MOTORWAY. He testified that it is his duty to inform himself as to explosives being transported on the railroads and that he is familiar with the product manufactured at Geneva and involved herein, and that the ammonium nitrate contains approximately 5% hydrogen, 35% nitrogen and the balance is made up of oxygen (R. 20). He then conceded that the ammonium nitrate is prilled, which means that it is in granules about the size of a grain of rice, each prill being coated with Fuller's earth, an organic coating (R. 33, 45, 46, 48 and 66). On redirect examination, counsel who had called him asked the folowing questions:

"Q. You stated the Fuller's earth is an organic—

A. Coating.

Q. I mean, there is no doubt in your mind about that?

A. No, sir.

Mr. Worsley: That's all." (R. 66).

This is very important, as the organic coating on ammonium nitrate makes it more susceptible to fire and explosion, in accordance with the information which will be cited hereafter.

The Utah statute relating to this mtater, and apparently the only statutory definition in Utah on explosives, is Section

41-6-5(f) which is found under the title "Motor Vehicles" and the chapter dealing with traffic rules and regulations. It reads as follows:

> "(f) 'Explosives.' Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion, by percussion or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the reluctant gaseous pressures are capable of producing destructible effects on (contiguous) objects or by destroying life or limb."

The record shows that process of the explosion is as follows:

> "COM. HACKING: Mr. Hardy, what chemical action causes the ammonium nitrate to explode? It it shock or heat, or what?
>
> A. It is a combination. This isn't my testimony—I have some books over there—and it has been given a test. It is the generation—the oxidizing agent—the ammonia contains its own oxygen, and the additive of the petroleum products generates the additional heat to form what is necessary to give it the detonation with the insertion of a blasting cap or the booster. In other words, it is the two together that generates sufficient terrific heat to generate the detonation.
>
> COM. HACKING: Isn't the heat that causes the chain reaction that causes the explosion?
>
> A. That's right.
>
> COM. HACKING: And whether you get that heat from the cap or booster, however you get it, if you can get that heat then you get your blast.

A. It is instantaneous with a booster, instant heat so to speak."

It is conceded by all that both ammonium nitrate and dynamite, and all commercial explosives, usually require a detonator to start the explosion.

"COM. HACKING: Of course, dynamite takes a detonator.

A. Of course, our experience with ammonium nitrate—

COM. HACKING: I don't mean by that ammonium nitrate and dynamite are the same thing, but all commercial explosives usually require a detonator.

A. That is correct.

COM. HACKING: Black powder requires a detonator.

COM. BENNETT: Let us ask this then, to follow this up: Would a detonator alone cause ammonium nitrate to explode?

A. Well, now, let me answer it this way, it has been—that has been answered pro and con. It has been shown that it will not always detonate with a detonator, but it is undetermined. Sometimes it will and sometimes it wont."

Mr. Hardy, in his obvious effort to discredit the explosive character of ammonium nitrate, repeatedly pointed out that the commodity is sold under the label of "fertilizer" and so advertised, but when asked about this he conceded that this ammonium nitrate comes from Geneva in a prilled form, coated with the organic coating of Fuller's earth, and that it is purchased and used by Kennecott Copper solely as an explosive for blasting purposes.

Great weight was placed by him on a book of Chemistry which he brought along with him, and he quoted from the same:

> "The experience of manufacturers indicate that no hazards exist due to spontaneous combustion with fertilizer grade ammonium nitrate when properly manufactured or handled. There is no substantiating record of explosions of unconfined fertilizer grade ammonium nitrate due to heat or fire alone. There is no basis for the various theories that ammonium nitrate is sensitized or rendered dangerously explosive either by compressing in a pile or by passage through a crystal transition."

It is to be noted that said quoted passage relates to spontaneous combustion and refers to "unconfined fertilizer." Apparently ammonium nitrate is non-exploding due to heat or fire alone, but the record shows that this ammonium nitrate is in addition organic coated and is confined in several ways, in that it is confined in 50 lb. bags, is confined in closed van semi-trailers in transportation from Geneva to Bingham Canyon, and is again confined in the blasting drill hole at the mine prior to detonation.

The record also shows that reference was made to the Interstate Commerce Commission regulations relating to explosives and other dangerous articles, Exhibits 1, 2 and 3, and it is conceded that the Interstate Commerce Commission classifies the ammonium nitrate as an "oxidizing material" rather than as an "explosive." The exhibits show the requirements of the Interstate Commerce Commission as to the labeling of ammonium nitrate and restrictions upon the loading of the ammonium nitrate with other commodities, and other

safety requirements imposed because the same is considered as a dangerous article. It is to be noted from Exhibits 1 and 2 that the ammonium nitrate with organic coating is classified separately from mere ammonium nitrate or ammonium nitrate fertilizer with no organic coating, and that special packing, labeling rules apply to it, including the restriction that not over 100 pounds can be handled of such commodity by the rail express and Exhibit 3 shows prohibition against loading what is there designated as "flammable solids or oxidizing materials" on vehicles with other explosives.

The record shows that the prilled ammonium nitrate with organic coating is used extensively in blasting for road jobs, reclamation projects, as well as mining, and a witness from Ashworth testified that it had transported substantial quantities to Little Mountain for the blasting of materials to be used in the fill across Great Salt Lake during the past years. Testimony further was that Ashworth has transported explosives for many years, serving the explosives manufacturers at Bacchus, Utah, and Gomex, Utah, and now transports ammonium nitrate to the same users of explosives from those two plants, as well as the haul from Geneva to Bingham Canyon now at issue.

On the issue of the compensable nature of the tariff increase, the testimony was first from the representative of Utah Copper Company, Mr. Pratt, who testified that they buy the ammonium nitrate f.o.b. the plant at Geneva and arrange for the transportation and pay for the same and that they, as the shipper, were agreeable to the increase in the rate from 12c per cwt. to 18c per cwt.; and that they considered the rate to be reasonable. Mr. Hayes testified that the operating

costs of Ashworth were 40c per running mile, and that the distance involved from Geneva to Bingham Canyon via Salt Lake City, as the operation is conducted, is 106 miles. This 18c rate applied to the average load of 40,000 pounds would produce revenue of $72.00 per round trip, whereas the cost of operation would be $42.00, thus clearly making the rate compensatory.

The attack upon the compensatory nature of the rate was made by protestant Carbon Motorway. (It is to be noted that first they attacked the rate as being too low and wholly unwarranted in that respect, and next shifted to the basis that it was not compensatory). However, their witness testified that their average cost was 50c per running mile, which would make a total cost of $53.00 for the round trip. Applying their rate of 30c per cwt., their revenue would be $120.00 per trip, which would leave them a profit of $77.00, plus the use of their equipment for a forward movement from Salt Lake City to Utah County on their regular operations. The testimony further was clear that an operation of this nature, where the product is loaded at point of origin by the personnel at Geneva and unloaded at destination by personnel at the Kennecott Copper mine, is much more economical than an operation where the carrier has to perform both the loading and unloading work, and further, that the type haul here involved permitted the scheduling in such a manner as to handle it in an economic fashion, as the loads averaged 40,400 lbs. each, and there were no intermediate stops, pickup or delivery expenses relating to this.

In the territorial scope of the operations of Ashworth, it is noted that Exhibit No. 5, which was presented as the

Ashworth Certificate No. 1195, described the commodity as set forth in the certificate, but omitted a designation as to the territory. This was corrected by an Erratum Order of the Commission, amending said Certificate No. 1195 so as to include the language "between all points and over all highways in the State of Utah." A copy of said erratum order is found in the file (R. 235, 236). The background on this is the transfer of the authority from Rulon C. Ashworth, et al., partners doing business as Ashworth Transfer Company, to the corporation Ashworth Transfer, Inc., which occurred in 1957. Here through error and inadvertence, the territorial designation was omitted from the certificate. Such has been fully corrected and all parties, including the Commission, had assumed that such territorial description was properly a part of the certificate itself. (Finding No. 2, R. 262).

Commissioner Hacking, in his dissent (R. 267-271), made particular findings as to the issue of the rates being compensatory. Such cannot be controverted, as they conform with the facts in the case, and the same should be adopted by the Commission as a whole on the issue of the compensatory nature of the rates in favor of applicant Ashworth. We direct the Court's attention to the entire dissenting opinion, and particularly to the following portions of it:

> "In recent years ammonium nitrate has been used in large quantities as an explosive particularly by open pit mine operators and large scale earth movers. It has to a very large degree replaced dynamite and other conventional type explosives where quantity use of blasting material is involved. A substantial amount of ammonium nitrate was used, for instance, by the contractors in Little Valley, Utah, in connection with the

construction of the Southern Pacific Company causeway across the northern end of Great Salt Lake, for the purpose of blasting out fill materials. Ashworth transported a large part of the ammonium nitrate used at Little Valley under its explosive hauling authority. Very substantial quantities of ammonium nitrate are used by Kennecott Copper Corporation for blasting purposes at its open pit mine in Bingham Canyon.

"The powder companies, American Cyanimid Company at Gomex, Utah and Hercules Powder Company at Bacchus, Utah, now supply ammonium nitrate to their customers for use as an explosive and Ashworth performs the hauling service on ammonium nitrate and other explosives for these powder companies.

"Under Motor Carrier's Explosives and Dangerous Articles Tariff No. 10, ammonium nitrate is not classed as an A or B explosive, but is a flammable solid and an oxidizing material and a dangerous article requiring labeling, and subject to specialized handling.

"The Utah Public Service Commission has not by rule defined or classified explosives, and other dangerous articles, but does for safety regulation, apply the rules of the Interstate Commerce Commission. Under Utah law regulating traffic on highways, three classes of dangerous articles are defined, namely: Explosives, flammable liquid, and corrosive liquid. Clearly, ammonium nitrate is a dangerous article, but it is neither a corrosive liquid or a flammable liquid, and therefore, under Utah law, fails in the explosive category. The definition of explosives, contained in Section 41-6-5 Subsection (f) is set forth in paragraph 4 of the majority decision. No explosive that can be handled and used by industry explodes spontaneously unless from faulty packaging, handling or storing. In order to be usable an explosive must be susceptible to handling in transportation and in placing at the point

where the blast is to occur. At that point the explosion is induced by the use of other agencies, be it detonating caps, ignition by fire, shock, auxiliary combustion or some other form of booster.

"It is clear that ammonium nitrate is used as an explosive, is sold by explosive manufacturers, is transported as a dangerous article and is defined under Utah law as an explosive. If it is said that it is not a true explosive, it still comes under the commodity description of Ashworth, as being a commodity 'such as, but shall not be limited to * * * * explosives.' "

STATEMENT OF POINTS

POINT I

THE COMMISSION ERRED IN ITS INTERPRETATION OF SECTION 41-6-5(f) U.C.A. 1953, WHICH DEFINES "EXPLOSIVES."

POINT II

PRILLED AMMONIUM NITRATE AS SHIPPED FROM U. S. STEEL CO. AT GENEVA TO BINGHAM CANYON FOR BLASTING PURPOSES IS AN EXPLOSIVE WITHIN THE INTENDMENT OF THE ASHWORTH TRANSFER'S CERTIFICATE.

POINT III

THE PRILLED AMMONIUM NITRATE TRANSPORTED TO BINGHAM CANYON FOR BLASTING PURPOSES IS A COMMODITY "SUCH AS AN EXPLO-

SIVE" WITHIN THE INTENDMENT OF THE ASHWORTH TRANSFER'S CERTIFICATE.

POINT IV

THE COMMISSION ERRED IN FINDING AND CONCLUDING THAT AMMONIUM NITRATE TRANSPORTED FROM GENEVA TO BINGHAM CANYON IS NOT WITHIN THE TERMS OF THE CERTIFICATE HELD BY ASHWORTH TRANSFER, INC.

POINT V

THE FINDINGS AND CONCLUSIONS SET FORTH IN THE DISSENT OF COMMISSIONER HACKING CLUSIONS OF THE COMMISSION.

POINT VI

THE PROPOSED TARIFF INCREASE FROM 12c CWT. TO 18c CWT. ON THE MOVEMENT OF AMMONIUM NITRATE FROM GENEVA TO BINGHAM CANYON IS REASONABLE AND COMPENSATORY AND THE COMMISSION SHOULD SO FIND.

POINT VII

THE MAJORITY OF THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN FINDING THAT THE ASHWORTH CERTIFICATE DOES NOT AUTHORIZE THE TRANSPORTATION OF THIS PRILLED AMMONIUM NITRATE FROM GENEVA TO

BINGHAM CANYON AND IN ORDERING ASHWORTH TO CEASE TRANSPORTATION OF THAT COMMODITY.

ARGUMENT

POINT I

THE COMMISSION ERRED IN ITS INTERPRETATION OF SECTION 41-6-5(f) U.C.A. 1953, WHICH DEFINES "EXPLOSIVES."

POINT II

PRILLED AMMONIUM NITRATE AS SHIPPED FROM U. S. STEEL CO. AT GENEVA TO BINGHAM CANYON FOR BLASTING PURPOSES IS AN EXPLOSIVE WITHIN THE INTENDMENT OF THE ASHWORTH TRANSFER'S CERTIFICATE.

The two members of the Commission have clearly erred in construing the prilled ammonium nitrate with its organic coating of Fuller's earth as a non-explosive. We feel certain that the "powder monkeys" at Bingham who detonate some 160,000 pounds of this every week would almost consider such a conclusion laughable. Instead of vast quantities of dynamite, the ammonium nitrate blasts the rock loose in this great open pit mine.

Not only is the plant at Geneva selling ammonium nitrate for blasting purposes, but the other explosives manufacturers in Utah sell such to their customers for blasting, namely, Hercules Powder Co. at Bacchus and American Cyanimid at Gomex, Utah. Is this product which does the work of an

explosive, whether it is an "explosive" or not? The Ashforth certificate spells out the word "explosive" and Ashworth has transported explosives continuously for over thirty years.

Let us turn to the language of the statute, Section 41-6-5(f) U.C.A. 1953, and see whether or not, on the face of it, this commodity does qualify as an "explosive" in Utah. Incidentally, we acknowledge that the Interstate Commerce Commission has specified in its regulations that ammonium nitrate is an "oxidizing material" rather than an "explosive," but it does include the ammonium nitrate alone, as well as when coated with organic materials, in the "Dangerous Articles" regulations of the Commission. This Utah statute, of course, controls over the Interstate Commerce Commission regulations if the commodity involved comes within the definition specified by the Utah Legislature, as this is an intrastate shipment. Our Public Service Commission has not adopted any formal definitions in contravention of this statutory expression.

First, we recognize that ammonium nitrate is a "chemical compound" as referred to in the statute, as Mr. Hardy specified that such is a combination of ammonium, nitrate, oxygen and other chemicals. We know that such is the product of the chemical plant adjoining the steel mill at Geneva, Utah, and thus the first qualification of the statute is met. In addition, each grain is coated with Fuller's earth. *Second,* it is "commonly used or intended for the purpose of producing an explosion." The fact that Ashworth has transported 40,000 pound loads four times a week for the past year, and Carbon transported 7,605,406 pounds of it to the Kennecott Copper

mine for blasting purposes would seem to substantiate the fact that it is "commonly used or intended for the purpose of producing an explosion." The witnesses affirmed the common usage of it in mining and construction operations for blasting purposes. *Third,* "shall contain any oxidizing and combustive units or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion, by percussion or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on (contiguous) objects or of destroying life or limb." The oxidizing factor here involved, as specified by the statute, is admitted by all parties and it is so classified by the regulations of the Interstate Commerce Commission. There is no question but what at the Kennecott Copper mine the same is ignited by a detonator or by fire, within the language of the statute, and thereupon blasts away.

The physical operation of this is of this nature: The vast majority in substance of the "shot' 'consists of ammonium nitrate. Some diesel oil or other petroleum product is poured onto the ammonium nitrate so as to assure its uniform ignition —so that it will burn completely. This burning is accentuated or initiated by the detonator or booster, which is likewise applied to the shot there at the blasting site. We therefore have a double qualification under the disjunctive language in the statutory definition, because the confined ammonium nitrate in the blasting hole is exploded by the fire, which is made uniform through the application of diesel fuel or petroleum, and the whole process is initiated by a detonator. The remain-

ing language of "sudden generation of highly heated gases, etc." means only that the thing explodes. The three years of successful blasting at the Kennecott Copper mine alone verifies this factor.

There can be many, many refinements of the blasting process through the use of dynamite, nitroglycerine, or any of a hundred or more possible combinations of materials and boosters, detonators or other means of initiating the explosion, but no matter what you call it it does explode, and it is used at the Kennecott Copper mine only for that purpose. Even though Mr. Hardy's railroads have been transporting it as a fertilizer, and even though it is used extensively as a fertilizer, nevertheless this prilled ammonium nitrate with the organic coating is purchased for Kennecott and is transported by Ashworth Transfer only for explosive purposes. To say less than that is wilfully shutting one's eyes to the realities of the situation. The Legislature adopted this definition originally in 1941, and this is the controlling definition.

Much is made of the fact that the bags wherein the prilled ammonium nitrate is sold are labeled "fertilizer." It is like merely labeling black blasting powder as "powder" and then pretending that it might be cosmetic face "powder." The name on the label means nothing when the lethal nature of the commodity is considered. The following citations make clear the explosive character. Note that the ingredient in the Texas City disaster was prilled ammonium nitrate with an organic coating, apparently identical with the commodity here at issue. This was labeled "fertilizer grade, ammonium nitrate." *Dalehite, Petitioner vs. United States of America,* 346 U. S. 15, 97 L.ed 1427, 73 Sup. Ct. 956, June 8, 1953.

This case involved the interpretation of the Federal Tort Claims Act as applied to the Texas City disaster, wherein cargoes of fertilizer grade ammonium nitrate exploded, killing 530 people, injuring 3,000 people, and causing many hundreds of millions dollars of damage.

The case was filed against the United States of America under the Federal Tort Claims Act. The explosion occurred on April 16 and 17, 1947, and this is a test case representing some 300 separate personal and property claims aggregating 200 million dollars. The opinion refers to "FGAN," representing "fertilizer grade ammonium nitrate," which is ammonium nitrate with a carbonaceous organic covering, prilled the same as the ammonium nitrate involved in the transportation from Geneva, Utah, to Bingham Canyon, Utah. The opinion recites that following World War II hostilities, the United States elected to aid the various countries involved in the war, and, among other things, agreed to furnish to European countries fertilizer to aid in the production of food stuffs. The Secretary of War agreed with the Secretary of Commerce that the 15 ordnance plants engaged in the manufacture of ammunition during the war be turned over to the production of fertilizer for export. The Army's Chief of Ordnance was delegated the responsibilty for carrying out the plan, and cost plus fixed fee contracts with private companies were executed for the operation of the plants and facilities. The Field Director of Ammunition Plants was appointed to administer the program and the fertilizer. FGAN, involved in the explosions at Texas City were manufactured by a sub-contractor. "FGAN"'s basic ingredient was ammonium nitrate, long used as a component in explosives. Its

adaptability as a fertilizer stemmed from its high free nitrogen content. Hercules Powder Company had first manufactured a fertilizer compound in this form on the basis of Cairn's Explosive Patent, No. 2,211,738 of August 13, 1940. The Cairn's process contemplates a product substantially identical to the Texas City FGAN. The process was licensed to the United States. The Government produced ammonium nitrate at certain other federal plants, and shipped it in solution to the reactivated graining centers ofr concentration. Thereafter, in addition to clay, a mixture of petrolatum, rosin and paraffin (RPD hereafter) was added to insure against caking through water absorption. The material was then grained to fertilizer specifications, dried and packaged in 6-ply paper bags, marked "Fertilizer (Ammonium Nitrate)".

The French Government had certain tonnage allocated to it and it had under its ownership the steamship Grandcamp and also leased the steamship High Flyer (which was privately owned, being loaded by independent stevedors hired by the French people at Texas City. In loading the FGAN a fire broke out on board the steamship Grandcamp on April 15, 1947, at about 8:15 A.M. A dispute exists as to whether or not this developed from spontaneous combustion in the FGAN or whether a carelessly thrown cigarette by one of the longshoreman started the fire in the FGAN. The district court found that it was caused by spontaneous combustion in the FGAN but in any event, the fire proceeded; efforts were made to quench the fire without avail. Finally the hold of the ship was closed off and steam introduced and all personnel removed from the ship, and then the FGAN exploded with a great force in the morning of that date. The fire resulting

to the piers and other facilities started a fire in the steamship High Flyer, which was likewise being loaded with FGAN, and this ship began to burn vigorously. The efforts to tow the High Flyer from the dock area failed, and finally that night at approximately 11:00 P.M. the steamship High Flyer also exploded, damaging itself and an adjoining steamship, adding to the loss of life and property damage recited before.

The Government on the appeal sought to preclude its liability that had been determined by the District Court, on the grounds that there is an exception in the Federal Tort Claims Act as to discretionary action on the executive level. This theory had been accepted by the 5th Circuit Court of Appeals (197 Fed. 2d, 771) and a majority of the Supreme Court of the United States also accepted this theory and affirmed the judgment of the Circuit Court, and reversed the District Court's decision against the United States of America. A very strong and extensive dissent was entered by Justices Jackson, Black and Frankfurter. Two of the Justices did not participate in the decision, namely, Justice Douglas anud Justice Clark.

However, there seems to be a little difference of opinion as to the factual background on this matter and as to the findings of the District Court following the extensive trial (30,000 pages of transcript) and we shall quote some of the excerpts from both the majority opinion, the District Court's opinion and the dissenting opinion dealing with the character and the propensities of FGAN.

> " 'This record discloses blunders, mistakes, and * * * acts of negligence, both of omission and commission, on the part of Defendant, its agents, servants and employees, in deciding to begin the manufacture

of this inherently dangerous Fertilizer.' It was his conclusion that, through early experiments, the United States has learned many facts, but did not pursue such investigation far enough to learn all the facts, . . . What facts it did learn, however, were sufficient to give Defendant knowledge and to put Defendant on notice, and if not, then upon inquiry that would if pursued, have led to knowledge and notice that such fertilizer which it decided to and began to manufacture was an inherently dangerous and hazardous material, a dangerous explosive, and a fire hazard. Such facts learned by Defendant pointed to and showed that such Fertilizer should not be manufactured, it that it was, under certain conditions and circumstances, most dangerous to everyone handling it in any way, and to the public . . ." (P. 1146).

"Defendant in manufacturing such Fertlizer, and particularly the Fertilizer on the Grandcamp and High Flyer, did so by a formula made and evolved by Defendant or under its direction. It used as a coating of such Fertilizer a substance or substances which rendered same highly susceptible to fire or explosion. There were various types of coating, but the coating finally used made the Fertilizer a very dangerous explosive and fire hazard. More than any other one thing, I think this coating made this commodity one of the most dangerous of explosives, . . . Such Fertilizer was by Defendant, or under it(s) direction, placed or sacked in bags made from paper or other substances which were easily ignited by contact with fire or by spontaneous combustion or spontaneous ignition of the Fertilizer . . ." (Page 1446).

" 'It was the duty of Defendant, well knowing as it did the dangerous nature and character of such Fertilizer, which Defendant shipped or caused to be shipped to Texas City, to notify and advise all of the carriers handling same, including the Steamships

Grandcamp and High Flyer, and to notify and advise the City and State Officers at Texas City, of the dangerous nature and character of such Fertilizer, to the end that such carriers and their employees and such officers could, if possible protect themselves and the public against the danger of fires from the explosions of such Fertilizer.'

"The District Court concluded:

" 'Clearly such Fertilizer ought never to have been manufactured. From the beginning on down, it was a dangerous commodity and a dangerous nuisance.' "

The following are excerpts from the dissenting opinion (P. 1448):

" . . . For we are not considering here everyday commodities of commerce or products of nature but a complex compound not only proven by the event to be highly dangerous, but known from the beginning to lie somewhere within the range of the dangerous. Ammonium nitrate, as the Court points out, had been 'long used as a component in explosives.' This grade of it was manufactured under an explosives patent, in plants formerly used for the manufacture of ordnance, under general supervision of the Army's Field Director of Ammunition Plants. Advice on detailed operations was sought from such experienced commercial operators of high explosives as the du Ponts and the Atlas and the Hercules powder concerns. There is not the slightest basis for any official belief that this was an innocuous product." (Pages 1448, 1449).

" . . . Reputable experts testified to their opinion that the fire could have been caused by spontaneous combustion. The Government's contention that it was probably caused by someone smoking about the hold brought forth sharp conflict in the testimony. There

was no error in adopting one of the two permissible inferences as to the fire's origin. And, in view of the absence of any warning that FGAN was inflammable or explosive, we would think smoking by longshoremen about the job would not be an abnormal phenomenon.

"The evidence showed that this type of fertilizer had been manufactured for about four years at the time of the explosion in Texas City. Petitioner's experts testified to their belief that at least a segment of informed scientific opinion at the time regarded ammonium nitrate as potentially dangerous, especially when combined with carbonaceous material as it was in this fertilizer. One witness had been hired by the War Production Board to conduct tests into explosion and fire hazards of this product. The Board terminated these tests at an intermediate stage, against the recommendation of the laboratory and in the face of the suggestion that further research might point suspected but unverified dangers. In addition, there was a considerable history over a period of years of unexplained fires and explosions involving such ammonium nitrate. The zeal and skill of government counsel to distinguish each of these fires on its facts appears to exceed that of some of the experts on whose testimony they rely. The Government endeavored to impeach the opinion of petitioners' experts, introduced experts of its own, and sought to show that private persons who manufactured similar fertilizer took no more precautions than did the Government.

"In this situation, even the simplest government official could anticipate the likelihood of close packing in large masses during sea shipment, with aggravation of any attendant dangers. Where the risk involved is an explosion of cargo-carrying train or ship, perhaps in a congested rail yard or at a dock, the producer is not entitled as a matter of law to treat industry

practice as a conclusive guide to due care. Otherwise, one free disaster would be permitted as to each new product before the sanction of civil liablity was thrown on the side of high standards of safety."

As a result of the adverse decision of the United States Supreme Court in which it held that the exception to the Federal Tort Claims Act precluded recovery from the Government, a new and separate proceeding was instituted, by a number of the plaintiffs and those suffering loss, against the French Government and the stevedoring company and others involved. There is presently pending before the United States Court of Appeals in the Fifth Circuit as case No. 18064 the case of Republic of France and Compagnie Generalle Transatlantique vs. United States of America, et al. This is a proceeding in admiralty for the purpose of exoneration from or limitation of liability resulting from the fire upon and explosions of the S.S. Grandcamp while she was loading a cargo of fertilizer grade ammonium nitrate at Texas City, Texas, in April of 1947. The plaintiffs are the government and the shipping agency of the government of France and the matter was tried before the District Court there in Texas. As a result of a very extensive trial, the District Court found that there was negligence on the part of the ship owner and the shipping agents, namely the petitioners, and denied the requested exoneration from or limitation of liability, thus leaving open some 200 million dollars worth of claims that had not been settled by the government. This matter is now pending before the Circuit Court of Appeals, but we would like to refer to several of the findings of the District Court following the trial of said case. These are as follows:

P. 426-27. *Finding No.* 19

"However, ammonium nitrate—together with other nitrates—has long been known and recognized, not alone by scientists and chemists, but by all informed persons in the transportation industry, as an 'oxidizing agent' and a fire hazard. It is now, and was long prior to 1947, classified by the Coast Guard as a 'dangerous article' (46 C.F.R., 146.22-100; this reference, and others throughout are to Coast Guard Regulations in effect, and a snumbered, on April 16, 1947) and is within the sub-class of 'inflammable solids and oxidizing material' or 'oxidizing agent' is one which, while not necessarily inflammable itself, decomposes when brought in contact with burning organic matter, and releases oxygen in quantity, thus supporting and encouraging the fire, and causing a more rapid rate of combustion, and an increase in temperature (46 C.F.R., 146.22-3). Similarly, where an oxidizing agent is present, the fire may not be extinguished by smothering or by eliminating outside sources of oxygen. This is so because abundant oxygen is supplied from the heating of the oxidizing agent. Regulations for its handling and stowage are prescribed by Coast Guard Regulations (46 C.F.R. 146.01-1, et seq.)

P. 432-33. *Finding No.* 24

"The petitioners as owner and operator of the Grandcamp (and with long experience in transporting cargoes of nitrates); the French Supply Council as Shipper; Captain DeGuillebon as Master of the Grandcamp; E. S. Bennings Inc. as the ship's agent; and A. D. Suderman Stevedoring Company all are chargeable as a matter of fact and of law with knowledge that ammonium nitrate (as distinguished from FGAN) is and was an oxodizing agent and a fire hazard; and that ammonium nitrate was a 'dangerous article' within the purview of the statutes and Coast Guard

Regultaions dealing therewith (46 U.S.C.A., 170 et seq.; 46 C.F.R. 146.02-3, 146.02-4, et seq.).

P. 437-38. *Finding No.* 30 *and Note* 7

"The fire of April 16 resulted from this smoking by longshoremen in the No. 4 hold shortly after 8 a.m. of that date, and had its origin in a carelessly discarded cigarette or match.

"7. Whether the fire on the Grandcamp began from spontaneous combustion, or as a result of careless smoking, has been a hotly disputed issue not only in this trial, but in every investigation, hearing, and trial involving the disaster since its occurrence. The truth likely will never be known with any degree of certainty. It is noted that Judge Kennerly, of this Court, found spontaneous combustion to be the cause in his findings in Dalehite v. U. S. On appeal (In Re Texas City Disaster Litigation, (5th Cir.) 197 F. (2) 77.), the Court reversed and rendered with three of the six Judges (Chief Judge Hutcheson, Judges Borah and Strum) expressing the view that the trial Court findings were clearly erroneous. The United States Supreme Court affirmed (Dalehite v. U.S., 346 U.S. 15). Similarly, the FGAN explosion of the Ocean Liberty in the harbor at Brest, France, July 17, 1947, was attributed by the trial court to spontaneous ignition (Accinento Lts. v. Cosmopolitan Shipping, Inc., 99 F. Supp. 261, Aff'd. (4th Cir.) 199 F. (2) 134."

P. 440-41. *Finding No.* 32 *and Note* 8

"The Master could and reasonably should have foreseen and anticipated the danger of a disastrous fire, with the possibility of explosion, in failing to prevent smoking in the presence or proximity of the FGAN. His negligence in this regard constituted a

proximate cause of the fire, the resultant explosion, and the damages which ensued."

> "8. In connection with this finding as to 'foreseeability', it is undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientifiec field as well as the transportation industry. What was not generally recognized before Texas City was (a) that ammonium nitrate would cause a detonation of such magnitude in the absence of great confinement and pressure (as within a bomb), and (b) that fire and heat alone would cause such detonation, without an initial or booster detonation; or, according to one theory, with such initial detonation resulting from an explosion of accumulated gases, which in turn come from the heated and decomposing ammonium nitrate . . ."

We therefore have two courts finding separately that the explosion resulted from two separate causes (a) the spontaneous combustion of the FGAN and (b) the carelessly thrown match or cigarette of a longshoreman into the FGAN, but in any event, the burning of the FGAN resulted in the explosions upon both the Grandcamp and the High Flyer.

In each of the decisions, the explosive nature, propensities and character of this fertilizer grade ammonium nitrate were judicially determined. No one can logically or legally say that this same commodity being transported from Geneva to Bingham Canyon for blasting is not an explosive.

POINT III

THE PRILLED AMMONIUM NITRATE TRANSPORTED TO BINGHAM CANYON FOR BLASTING

PURPOSES IS A COMMODITY "SUCH AS AN EXPLOSIVE" WITHIN THE INTENDMENT OF THE ASHWORTH TRANSFER'S CERTIFICATE.

POINT IV

THE COMMISSION ERRED IN FINDING AND CONCLUDING THAT AMMONIUM NITRATE TRANSPORTED FROM GENEVA TO BINGHAM CANYON IS NOT WITHIN THE TERMS OF THE CERTIFICATE HELD BY ASHWORTH TRANSFER, INC.

POINT V

THE FINDINGS AND CONCLUSIONS SET FORTH IN THE DISSENT OF COMMISSIONER HACKING SHOULD BE ADOPTED AS THE FINDINGS AND CONSHOULD BE ADOPTED AS THE FINDINGS AND CONCLUSIONS OF THE COMMISSION.

As we are all aware, this Court has had the opportunity to study the Ashworth intrastate operating authority on previous occasions. Each time a different problem has existed but ancillary to these, we believe, the Court has affirmed the right to transport "explosives" and "commodities such as, but not limited to . . . explosives." The following cases will illustrate our position, having in mind that the Certificate reads, in part, " . . . which commodities shall be such as, but shall not be limited to the following . . . explosives."

W. S. Hatch Co. v. Public Service Commission of Utah, 3 Ut. (2d) 7; 277 P. 2d 809 (1954).

The Court interpreted the Guy Prichard operating authority to determine whether or not he could transport acid to the uranium mills. It reversed the Commission. The Prichard authority is practically verbatim with the Ashworth authority as to the problems here before the Court. In the decision, Justice Crockett quoted the certificate and pointed out that most of our language referred to commodities which by their external, physical dimensions or weight require special equipment and then noted, "The single exception is 'explosives,' which is specifically named.' P. 813.

In the next paragraph he states:

> "Defendant argues that the designation of merchandise must necessarily be general because it is impossible to list every item, calling attention to the language 'which commodities shall be such as, but shall not be limited to the following * * * *.' This he claims should be given significance in liberally interpreting the grant to include acid. It is true that the grant must be to some degree general for the reason just stated. On the other hand, the very fact of regulation by certificate pre-supposes limitations to be contained within it. It is both necessary and desirable that the commodities authorized be defined as clearly and understandably as possible. This can be done with certainty at least as to the *classes* of commodities covered, which was plainly the objective of this certificate."

We note that the expression that the "such as, but not limited to" language refers to certain classes of commodities, one of which is "explosives," both in the Prichard and Ashworth authorities. Without doubt, if ammonium nitrate is not an explosive it certainly is a commodity "such as" an explosive

within the meaning of the Certificate. This "such as, but not limited to" language modifies and applies to all of the language in the ensuing phrase in the certificate, and "explosives" is one of the separate classes of commodities so modified.

In *Ashworth Transfer v. Public Service Commission,* 2 Ut. (2d) 23; 268 P (2d) 990 (1954), the same commodity description was considered by the Court. This was in conjunction with an award of such authority to Harry L. Young & Sons by the Commission. The Court affirmed the grant of rights to Young on the grounds that competent evidence as to convenience and necessity had been adduced before the Commission. In this decision, Justice McDonough referred to generic headings as to commodities which because of size or weight require special equipment, and then said: "The only commodity listed not descriptive of the general category is 'explosives.' " He then opined that "explosives" was somewhat inconsistently placed in the list. This may be true, but we must recognize that it is in fact in the list and is modified by the same language, "such as, but not limited to" as are the other nouns therein.

In 1959 the operating authority came up again for consideration by your Court, *Salt Lake Transfer and Ashworth Transfer v. Barton Truck Lines, et al.,* 8 Ut. (2d) 401; 335 P (2d) 829. The issue there involved was as to the territorial scope and questioned right to transport general commodities. The Commission was upheld in its decision. Justice Crockett, writing the opinion, reaffirmed the principle enunciated in the Peterson case that the Court will look to the plain terms in a certificate. We submit that the plain terms, "such as, but

not limited to . . . explosives . . . " will include the ammonium nitrate used for blasting.

Finally, July 26, 1960, the Court, in Case No. 9082, ... Ut. (2d); ....; .... P(2d) ...., *Salt Lake Transfer & Ashworth Transfer v. Public Service Commission and Barton Truck Line,* held, through Justice Callister, as to the Ashworth and Salt Lake Transfer rights "These two plaintiffs have had authority to transport household goods, commodities requiring specialized service or equipment, explosives, and some items." (p. 1). Then after reciting the complete absence of any shipper testimony on explosives for Barton, and that Ashworth and Salt Lake Transfer produced evidence on their highly competitive service in hauling explosives, the Court held,

> "A search of the record reveals nothing upon which to base the conclusion that the addition of Barton's services will in any way add to public convenience and necessity with regard to explosives. As the record now stands, Ashworth and Salt Lake Transfer are rendering an adequate service in the transportation of explosives . . ."

Chief Justice Crockett concurred specially, but did not dissent in any manner as to the explosives service or authority held by Ashworth and Salt Lake Transfer.

It would appear from the foregoing:

(a) the authority of Ashworth to transport explosives is judicially fixed; and

(b) the authority of Ashworth to transport "commodities . . . such as, but not limited to . . . explosives . . . " is judicially fixed.

Now we revert again to a determination as to whether or not the ammonium nitrate is either an "explosive" or is "such as an explosive."

The statutory definition of what is an explosive seems broad enough to clearly include this ammonium nitrate which produces daily tremendous explosions in the blasting operations at the Kennecott Copper mine. Counsel for the protestant probably will contend that the Court cannot consider this definition because it is a part of Chapter 6 relating to Traffic Rules and Regulations, a part of the Motor Vehicle Act. It is true that Section 41-6-1 U.C.A. 1953 reads, "Definitions—The following words and phrases when used in this act shall, for the purposes of this act, have the meanings respectively ascribed to them." Section 41-6-5(b) is one of the sections in that Act.

The Public Service Commission is charged in part with the enforcement of safety in the movements of common and contract carriers for hire over the highways in Utah. No other known definition of explosives has been given by our Utah legislature. By merely saying so, the protestants cannot preclude either the Commission or this Court from considering the definition as a prime guide in its deliberations. As a further aid, we quote the definition found in Webster's New International Dictionary, p. 773:

> "explosive. n. 1. An explosive agent; a compound or mixture susceptible of explosive chemical reaction, as gunpowder or nitroglycerin. The chief classes of explosives are (1) Mixtures of combustible but non-explosive material with an oxidizing agent, esp. a nitrate or a chlorate (ordinary gunpowder, blasting powder, etc.) (2) Organic nitrates, as nitroglycerin (glycerin nitrate) or guncotton (cellulose nitrate);

also, mixtures containing these, as dynamite. Dynamites are divided into two classes, according as the material used to absorb the nitroglycerin is inert or itself explosive. The smokeless powders contain cellulose nitrate as the sole or chief ingredient. (3) Nitro substitution products or mixtures containing these, as lyddite and rackarock. (4) Fulminating powders, as fulminite of mercury or hydrazoic acid, used as detonators."

Even the citation set forth on sheet 5 of the Findings (R. 265) by the two Commissioners appears to aid our position. This was an insurance policy case wherein the Missouri Court was construing a policy exclusion which prohibited keeping of explosives on the premises. Fireworks had exploded, causing a fire and the loss for which recovery was sought; Henderson v. Massachusetts Bonding and Ins. Co. (Mo.) 84 SW (2d) 922. Under the strict construction rule the fireworks were held not to be a forbidden explosive. The Court said that "explosives" is a "general term which ordinarily could be understood to mean explosives commercially used and sold as such . . . " The dual use of ammonium nitrate as a fertilizer and as an explosive is well known; but as an explosive it is "commercially used and sold as such."

We most strongly urge that the two Commissioners got "off the track" when they viewed the incidental application of some fuel oil to the ammonium nitrate along with the blasting cap or detonator as such a major factor as to destroy its character as an explosive. The chemical compound of ammonium nitrate is the blasting agent, the true explosive, not the small quantity of petroleum and the blasting cap.

Commissioner Hacking, in his dissent, has made careful,

realistic findings and conclusions as to the explosive nature of ammonium nitrate. Among other things, he found:

> "It is clear that ammonium nitrate is used as an explosive, is sold by explosive manufacturers, is transported as a dangerous article, and is defined under Utah law as an explosive."

This finding, along with the others set forth in his dissent as to the scope of operations and the reasonableness of the proposed new rate, should be adopted as the findings of the entire Commission.

POINT VI

THE PROPOSED TARIFF INCREASE FROM 12c CWT. TO 18c CWT. ON THE MOVEMENT OF AMMONIUM NITRATE FROM GENEVA TO BINGHAM CANYON IS REASONABLE AND COMPENSATORY AND THE COMMISSION SHOULD SO FIND.

POINT VII

THE MAJORITY OF THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN FINDING THAT THE ASHWORTH CERTIFICATE DOES NOT AUTHORIZE THE TRANSPORTATION OF THIS PRILLED AMMONIUM NITRATE FROM GENEVA TO BINGHAM CANYON AND IN ORDERING ASHWORTH TO CEASE TRANSPORTATION OF THAT COMMODITY.

In the statements of facts we've shown mathematically two facts relating to the proposed 18c cwt rate which Ashworth

proposes to publish and which was the prime subject matter of the hearing:

(a) The rate is compensatory: Ashworth's revenue on this haul per load will be $72.00, its costs $42.40, leaving a profit of $29.60 per round trip.

(b) The rate is reasonable: The shipper who must pay the bill (Kennecott Copper) supported the increase of rate to the 18c level, and the only protestant's rate for the same haul is 30c cwt.

As the two Commissioners did not make any findings on this primary element of the case, we propose that the Court adopt the findings of Commissioner Hacking, as he has carefully documented the basis of the rate change, its reasonableness and its compensatory character (R. 270-271). The Court has sufficient before it to justify an Order directing the Commission to permit publication of the 18c cwt rate by Ashworth on the movement of ammonium nitrate from Geneva to Bingham Canyon.

Our concluding point is that the majority of the Commission acted in an arbitrary and capricious manner in classifying ammonium nitrate as not an explosive, or even "such as an explosive." No malice is implied by labeling the finding of the two Commissioners as being "arbitrary." It apparently is the result of an incomplete understanding and utterly unrealistic approach to the problem.

Ashworth has been hauling explosives to mines for the past thirty years. No matter who the manufacturer or what the name is on the box, Ashworth has hauled it if it is used

as an explosive. Trade names change. New compounds are developed. Still the mining industry drills holes, places a chemical compound in the holes, detonates the same with a cap or other blasting agent, and an explosion ensues.

The fact that a product has multiple uses, as an innocuous fertilizer or as a dangerous article for blasting, should not rob the industry of the right to have the established explosive carriers transport that product to the mine site, the construction project or wherever it is needed.

This is not an application for convenience and necessity, where Ashworth would be required to prove public need for service. Ashworth has the authority, it has served the explosives shippers in the movement of ammonium nitrate for several years and Kennecott for the past 18 months; the Commission has known of this service and has acquiesced therein. The Commission has had on file and approved the published tariff on the 12c cwt level for Ashworth to haul the ammonium nitrate for the past 18 months; now when a mere rate increase is involved, the two Commissioners have adopted this improper classification of ammonium nitrate.

Just as in legislative matters, a governmental body such as the Commission has a duty of adopting only reasonable classifications of subject matter. The public interest of the segments of industry here affected (the mining and construction industries and the explosives industry — including United States Steel) compel a position of reasonableness. The arbitrary determination that this powerful blasting agent is not an explosive is contrary to fact, to public policy and to the standards of interpretation incumbent upon the quasi-judicial Commission.

WHEREFORE Ashworth Transfer, Inc., respectfully prays that the Court will reverse the Order of the two Commissioners and adopt the findings and conclusions of Commissioner Hacking. The Court should determine that ammonium nitrate is either an explosive or a commodity such as an explosive within the purview of the Ashworth rights and that the proposed 18c cwt rate is reasonable and compensatory.

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